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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

IN RE SOCIAL MEDIA ADOLESCENT)
ADDICTION/PERSONAL INJURY)
PRODUCTS LIABILITY LITIGATION.)
) **NO. 4:22-md-03047-YGR**
)
)
_____)

Oakland, California
Friday, June 21, 2024

TRANSCRIPT OF PROCEEDINGS

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Friday - June 21, 2024

9:28 a.m.

P R O C E E D I N G S

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THE CLERK: Good morning, everyone.

These proceedings are being court reported by this court. Any other recording of this proceeding either by video, audio, including screenshots or other copying of the hearing, is strictly prohibited.

Your Honor, now calling the Multidistrict matter 22-md-3047-YGR, In Re: Social Media Adolescent Addiction Personal Injury Products Liability Litigation.

Our appearances will be added in today's minutes by sign-in sheet.

Good morning, everyone.

THE COURT: Okay. So we have a couple of things to do today; obviously, case management and some argument. Let's just get warmed up and start with the case management issues first.

There's a stipulation with respect to the motion to dismiss the Florida AG complaint. That stipulation is granted. I think you're already proceeding on that basis in any event.

In terms of argument, we can set that for August. The day that I have available to meet with you in August is August 9th. Because of this trial, you have one of two options with respect to timing. We can meet at 8:30 in the morning, but we really

1 need to be done by 10:00 when my defendants show up; or we can
2 meet at 1:30 in the afternoon after they leave.

3 So, generally speaking, come on forward if you have a
4 perspective.

5 **MS. VALIN:** Donna Valin, Florida Attorney General.

6 I have no preference, Your Honor.

7 **THE COURT:** Okay. And it's not just that. I mean,
8 it's just our regular normal meeting.

9 **MR. SCHMIDT:** We would have a preference, if that does
10 work for the Court, the 8:30 time.

11 **THE COURT:** Okay. So if we don't finish and we need
12 to meet with the defendants, then you'll all have to go get the
13 coffee across the street and wait until I'm done. Criminal
14 cases take precedence. Okay?

15 **MR. SCHMIDT:** Understood, Your Honor.

16 **THE COURT:** And if I'm drinking a lot of coffee in the
17 morning, you'll know why.

18 **MR. SCHMIDT:** Understood as well.

19 **THE COURT:** So with respect to the July 12th, I
20 don't -- do we have a time for that? That, then, needs to get
21 moved to 8:30 if it's at a later time.

22 **THE CLERK:** It's at 9:30, Your Honor.

23 **THE COURT:** All right. So that will move up to 8:30.

24 Okay. There was an e-mail sent to me about the Zuckerberg
25 motion to dismiss. The trial and a couple of other things have

1 kept me really busy, so I wasn't prepared -- even though it's
2 ripe now, I wasn't prepared to hear argument. On the other
3 hand, I don't know that I need argument on this one.

4 Do you-all want to be heard on that motion?

5 **MR. HESTER:** Your Honor, Timothy Hester on behalf of
6 Meta and Mr. Zuckerberg.

7 We would appreciate the chance to be heard if the Court
8 has time for us.

9 **MR. JASINKSI:** Matthew Jasinski with Motley Rice for
10 the plaintiffs.

11 We would as well.

12 **THE COURT:** Okay. So do you -- we can set that for
13 July 12th.

14 **MR. JASINKSI:** Thank you, Your Honor.

15 **MR. HESTER:** Yes, Your Honor. Thank you.

16 **THE COURT:** Okay. For my courtroom deputy, I believe
17 the last step I was talking about, that's going to be Docket 29
18 and Case Number 23-5885. It's got a gavel, so we'll resolve
19 that gavel.

20 I did get your unopposed brief on the intercircuit
21 assignments. I have mentioned to Chief Judge Sutton that I
22 wanted to talk to him about that, and I haven't had a chance to
23 talk to him yet about it, but it's on my list of things to do.
24 So hopefully I'll get that resolved in the next month or so.

25 I wanted to start with him because he is the chair of the

1 Executive Committee and I suspect that if Chief Judge Sutton
2 agrees, everybody else will agree as well. So that's my plan.

3 There has been a motion to withdraw as counsel in the
4 Levin case, 22-6263. Do I have someone here on that case?
5 Yes? No?

6 I'm going to take it off calendar for next Tuesday. So
7 we'll vacate that. It seems like it should be granted; but it
8 also appears as if people -- counsel are talking about these
9 issues with respect to other plaintiffs with whom they've lost
10 contact. So perhaps we need to do this all at once.

11 Can somebody give me an update on that issue?

12 **MS. McNABB:** Good morning, Your Honor. Kelly McNabb
13 for Lief Cabraser for the personal injury plaintiffs.

14 **MS. PIERSON:** Good morning, Your Honor. Andrea
15 Pierson, Faegre Drinker, for the defendants.

16 **MS. McNABB:** Your Honor, we are meeting and conferring
17 with defendants on a proposed protocol to deal with motions to
18 withdraw as counsel where counsel has been unable to
19 communicate with the client. Our current count is there's
20 roughly around 20 plaintiffs who have not been able to be
21 reached. So we're meeting and conferring on a process that
22 hopefully will streamline that issue for Your Honor.

23 **THE COURT:** Okay. And do you -- what about this one
24 that I have on for Tuesday? Do you then want me to wait with
25 respect to that one?

1 **MS. PIERSON:** Andrea Pierson.

2 Yes, Your Honor, we'd prefer that you wait. Our goal was
3 to work with plaintiffs to develop a procedure so that these
4 don't become *pro se* plaintiffs that are difficult for you and
5 for the defendants to communicate with. We think it's better
6 to have a process that leads those cases to conclusion, and
7 we're working collaboratively with plaintiffs on that.

8 **THE COURT:** Okay. So I will do that, but we are
9 taking it off calendar. Okay?

10 **MS. McNABB:** Understood.

11 **MS. PIERSON:** Thank you, Your Honor.

12 **MS. McNABB:** Thank you.

13 **THE COURT:** Thank you.

14 Next I've got some *guardian ad litem* applications. Those
15 are granted. It's at Docket 829. And the motion to seal is
16 also granted at 828.

17 I've got motions for leave to file supplemental authority.
18 Those are also granted, Docket 917, 934, and 952.

19 The sealing of defendants' bellwether selections are also
20 granted, and this also relates to the replacement bellwether
21 selections. So requests at Dockets 811, 756, 757, 900, 905,
22 and 932 are narrowly tailored and contain private information
23 that need not be in the public record.

24 There is a request to deal -- there's another motion to
25 remand coming out of Oregon I believe. I expect to have the

1 order on the motion to remand that's pending out pretty
2 quickly. I think it makes sense for you-all to just wait and
3 look at that order. It may -- it may streamline any briefing.
4 So that's coming out soon. Then we can deal with the remand on
5 the other. Okay?

6 All right. I think those are all the administrative
7 things that I needed to deal with. Are there other
8 administrative issues that you'd like to address?

9 **MR. DONOHUE:** Your Honor, Matthew Donohue.

10 One other small thing. We just wanted to circle back to
11 from a couple months ago when we had the hearing on the
12 priority motion to dismiss. There was talk back then about
13 potential supplemental briefing on the negligence *per se*
14 claims; and with the briefing wrapping up on a number of these
15 other issues, we just wanted to circle back and see if that was
16 something Your Honor was still interested in.

17 **THE COURT:** I haven't thought about it. It wasn't
18 raised in the CMC statement, so I don't have an opinion.

19 **MS. HAZAM:** Your Honor, Lexi Hazam for plaintiffs.

20 It wasn't raised with us prior to this hearing either.
21 We're happy to discuss it with defendants and come back to
22 Your Honor regarding it.

23 **THE COURT:** Yeah. Why don't you meet and confer, and
24 then we can talk about it in July.

25 **MR. DONOHUE:** Okay. I do believe we sent an e-mail,

1 but we're happy to meet and confer and discuss.

2 **THE COURT:** So you could have sent an e-mail; but if
3 it's not in my statement, then --

4 **MR. DONOHUE:** I understand, Your Honor, of course.

5 **MS. HAZAM:** I don't believe I have the e-mail, but I'm
6 happy to discuss also.

7 **THE COURT:** All right. Why don't you meet and confer
8 on that, and we'll discuss it in July.

9 **MS. HAZAM:** Thank you, Your Honor.

10 **MR. DONOHUE:** Thank you, Your Honor.

11 **THE COURT:** Okay. Any other issues you want to get on
12 the radar?

13 **MS. HAZAM:** None for plaintiffs, Your Honor.

14 **THE COURT:** I don't see any defendants standing up, so
15 I'll assume nothing for defendants either.

16 Okay. So let's go straight into argument then. And to
17 the extent that you are dividing up issues, it would be helpful
18 for me to know who is doing what.

19 **MR. MATTERN:** Good morning, Your Honor. David Mattern
20 on behalf of the defendants.

21 **THE COURT:** Okay.

22 **MR. MATTERN:** Defendants and plaintiffs conferred, and
23 we anticipate -- I'm happy to deviate based on Your Honor's
24 guidance, but we anticipate argument on duty for Count 5, which
25 is against all defendants.

1 **THE COURT:** Who's arguing? What I want to know is:
2 Who's doing the argument?

3 **MR. MATTERN:** That's right, and I'll be doing the
4 argument on duty.

5 Mr. Schmidt from Meta will be arguing Counts 12 and 14,
6 which are against Meta only.

7 And Mr. Blavin is also here to argue the CSAM claims
8 against Snap that were in some short-form complaints.

9 And then, finally, Bailey Langner is here to argue
10 Counts 16, 17 and 18.

11 **MS. HAZAM:** Your Honor, Lexi Hazam for plaintiffs.

12 For plaintiffs, Jennifer Scullion will be arguing Count 5.

13 **THE COURT:** Hold on. Hold on.

14 (Pause in proceedings.)

15 **THE COURT:** Okay.

16 **MS. HAZAM:** Matt Jasinski will be arguing Counts 12
17 and 14 as well as this -- sorry.

18 Thank you.

19 Correction. He will be arguing the Counts 12 and 14.
20 Sorry.

21 Thank you.

22 He will not be arguing and instead James Marsh will be
23 arguing the CSAM Snap-specific claims.

24 And then, finally, Roland Tellis will be arguing Counts 16
25 to 18 for plaintiffs.

1 **THE COURT:** Okay. Hold on. I think I missed the name
2 of the third person.

3 **MS. HAZAM:** Sure. James Marsh will be arguing the
4 Snap-specific claims.

5 **THE COURT:** Okay. So let's go ahead and start with
6 Count 5, negligence.

7 You may proceed.

8 **MR. MATTERN:** Thank you, Your Honor, and good morning.
9 I'd like to use our time today on Count 5 to focus on
10 duty, and in particular on plaintiffs' burden to plead a duty,
11 and to talk about two different ways thinking about the
12 allegations in the master complaint and why under either way of
13 thinking, plaintiffs have failed to allege a duty.

14 The first that I want to talk about is that courts have
15 routinely decided not to extend negligence-based claims against
16 broadcasters, against video game makers, and against platforms.
17 These cases spend decades. They encompass allegations that a
18 defendant service is addictive, claims that a website had
19 inadequate safety measures, and even claims that a publisher
20 did not do enough to protect children.

21 And in declining to apply a duty in these circumstances,
22 courts have noted that negligence-based duties and -- indeed,
23 are not appropriate because the common law was not intended to
24 encompass this kind of conduct. It ensnares course and
25 line-drawing problems that they're not equipped to deal with,

1 and it would impermissibly chill free expression.

2 These policy considerations, and in particular that torts
3 should be cabined to avoid constitutional issues, are a
4 recurrent feature in these cases and apply equally here.

5 And the second frame that I want to talk about is, even if
6 Your Honor has pause about the first framing, if you just focus
7 on the allegations that are in the master complaint, plaintiffs
8 do not plead a duty. So the parties appear to agree that this
9 Court's prior order dismissing aspects of the priority claims
10 apply here; and then as they say, whatever was ruled out in the
11 priority order is also ruled out here.

12 **THE COURT:** Well, I mean, let's deal with that first.

13 Shouldn't the Court's prior order on Section 230 apply to
14 the nine nonpriority claims as well? I understand people want
15 to appeal that and that's fine, but I don't tend to like to be
16 inconsistent. So shouldn't they have equal applicability?

17 **MS. SCULLION:** Your Honor, Jennifer Scullion for the
18 plaintiffs.

19 Your Honor, I think both sides agree that Your Honor
20 called balls and strikes on Section 230, on First Amendment,
21 and that there's nothing about the nonproduct aspects of
22 Count 5 that changes that role preserving our rights with
23 respect to appeal, but I think we've agreed that we don't need
24 to revisit those issues.

25 **THE COURT:** Okay. So then what's left?

1 **MR. MATTERN:** I think that's where the parties have
2 maybe a disagreement. So based on the allegations that the
3 plaintiffs pleaded in paragraphs 929 and 930, what's left are
4 four subparagraphs that make allegations related to age
5 verification, to parental controls, and to the alleged lack of
6 tools to report misconduct.

7 There's no allegations of failure to warn in Count 5.
8 Indeed, the word "warning" doesn't appear at all between
9 paragraphs 914 and 938. And what's more, plaintiffs expressly
10 disclaim in paragraph 914 that they're relying on any of the
11 product counts, two of which were for failure to warn.

12 So we think it's clear, both based on the allegations and
13 on what plaintiffs have disclaimed here, that failure to warn
14 is not an element.

15 **THE COURT:** And do you disagree?

16 **MS. SCULLION:** Your Honor, we do.

17 **THE COURT:** All right. Give me this exact paragraph
18 that you rely on where you claim that there is a failure to
19 warn allegation.

20 **MS. SCULLION:** Your Honor, we've, of course, alleged
21 failure to warn factually.

22 **THE COURT:** All I want --

23 **MS. SCULLION:** Sure.

24 **THE COURT:** -- are paragraphs.

25 **MS. SCULLION:** Sure. Absolutely.

1 If you look at paragraphs 431 through 437 with respect to
2 Meta, paragraphs 543 to '53 with respect to Snap, paragraphs
3 675 to '89 with respect to TikTok, and paragraphs 812 through
4 819 with respect to YouTube, those are specific express factual
5 allegations that each of those defendants failed to properly
6 warn of the risks to children of using their platforms. All of
7 those factual allegations are incorporated by reference
8 expressly into Count 5 at paragraph 914.

9 **THE COURT:** All right. Response.

10 **MR. MATTERN:** I didn't hear my friend identify any
11 paragraphs between 914 and 938, which is the paragraphs --

12 **THE COURT:** So 914 says that they reallege and
13 reincorporate by reference each preceding and succeeding
14 paragraphs as though set forth fully at length herein, other
15 than Counts 1 through 4.

16 So that's -- this is a standard approach that litigators
17 always use. She's given me a series of paragraphs. I need a
18 response with respect to those paragraphs.

19 **MR. MATTERN:** Okay. I have two responses for why
20 those paragraphs are not incorporated, Your Honor.

21 The first is, in the paragraph that you just read from
22 914, it expressly disclaims Counts 1 through 4, two of which
23 are failure to warn claims.

24 **THE COURT:** All right. Hold on.

25 (Pause in proceedings.)

1 **THE COURT:** What paragraph does Count 1 start at? I
2 don't have my copy of the complaint up here. I can go get it
3 if I need to.

4 **MR. MATTERN:** Paragraph 832.

5 **THE COURT:** Say that again.

6 **MR. MATTERN:** Paragraph 832.

7 **THE COURT:** So all of the paragraphs she mentioned
8 precede 832.

9 **MR. MATTERN:** That's right, Your Honor. But I think
10 it's important that, one, plaintiffs have disclaimed that they
11 were alleging a failure to warn claim; but, two, even if you
12 don't find that argument convincing, courts have dealt with
13 this argument before when plaintiffs purport to incorporate
14 that.

15 **THE COURT:** So what you want me to say is -- look, I
16 can do this one of two ways. I can evaluate the paragraphs
17 that she just gave me; or it sounds like what you're asking me
18 to do is say, "Judge, even though they say in 914 that they
19 didn't incorporate certain paragraphs by reference or even
20 though they say they incorporate these paragraphs by reference,
21 they didn't."

22 **MR. MATTERN:** That's right, Your Honor.

23 **THE COURT:** How does that make any sense?

24 **MR. MATTERN:** So I have two responses to that. So if
25 you don't buy my argument that they said the failure to warn

1 claims are out, if you don't think that's persuasive, I think
2 the second argument I'd like to make is that this is a form of
3 what courts have called shotgun pleading, which is that it's --
4 the master complaint has over a thousand paragraphs; right?
5 It's over 200 pages. It's impossible for defendants to piece
6 together what the basis is for a plaintiff's claim if they can
7 later on point to dozens of paragraphs of allegations, as my
8 friend just did, that weren't pleaded or expressly referenced
9 in the count itself. And that's something the courts have
10 looked at before in saying, "No, plaintiffs can't do that."

11 **THE COURT:** Okay. So one of the things that we have
12 and one of the reasons that there's always given multiple --
13 well, I actually -- I only give one opportunity. Many of my
14 colleagues will give two, three opportunities to reassert.

15 So you now know that they are relying on these paragraphs.
16 That's what the motion practice has uncovered and made clear
17 and solidified. Do you have a substantive response to those
18 paragraphs?

19 **MR. MATTERN:** Yes, Your Honor. Those paragraphs are
20 insufficient to state a failure to warn claim. The limited --

21 **THE COURT:** Because why?

22 **MR. MATTERN:** That's right. The limited circumstances
23 where courts have recognized negligent failure to warn claims
24 deal with failure to warn about harm from third parties. This
25 Court's prior order said those third-party harm allegations are

1 out. We cited the district court decision in *Internet Brands*
2 that said California does not recognize this type of failure to
3 warn claim.

4 **THE COURT:** All right. Give me a minute to get the
5 complaint.

6 (Pause in proceedings.)

7 **THE COURT:** All right. I'm looking at 431 to 437.
8 What's the argument with respect to these?

9 **MR. MATTERN:** So two points again, Your Honor. Our
10 position is that for negligence as a -- outside of product
11 liability, so we're dealing with ordinary negligence, failure
12 to warn claims are limited to claims about failure to warn
13 about third-party harm or third-party bad actors, and that's
14 not supported by the allegations here.

15 And to the extent that there was any doubt about that,
16 this Court's prior orders have held that claims related to
17 third-party misconduct are barred.

18 **THE COURT:** Response.

19 **MS. SCULLION:** Your Honor, we have alleged failure to
20 warn with respect to the harm and risk posed by use of the
21 platforms. Your Honor recognized that was the nature of the
22 failure to warn claims plaintiffs have alleged. They are live.
23 They are being litigated in this case.

24 And as Your Honor has, I think, recognized, we've
25 incorporated the factual allegations by reference into our

1 negligence claim. There's no requirement that we separately
2 plead a failure to warn version of negligence. The authorities
3 we cite are clear that failure to warn is an aspect of what
4 makes your conduct unreasonably harmful, failing to warn about
5 the conduct.

6 **THE COURT:** And is that with respect to 543 to 553 as
7 well?

8 **MS. SCULLION:** Yes, Your Honor. If we turn to --

9 **THE COURT:** Is that the same with respect to 675 --

10 **MS. SCULLION:** 389?

11 **THE COURT:** -- to 689?

12 **MS. SCULLION:** Yes, it is, and also with respect to
13 the factual allegations of YouTube's failure to warn at
14 paragraphs 812 through 819.

15 There is nothing about the fact that this is pled as
16 negligence in a nonproduct setting that makes it any different
17 from the failure to warn claim in the negligent product setting
18 that Your Honor's already found that we can proceed on and is,
19 in fact, being litigated.

20 **THE COURT:** Okay.

21 **MR. MATTERN:** May I respond, Your Honor?

22 So two points. So one I already talked about, *Internet*
23 *Brands*, which is a case under California -- or applying
24 California law. A federal court said, "There's no failure to
25 warn claim recognized here."

1 Another case that deals with that that we discussed in our
2 pleadings is *Dyroff* where in the district court --

3 **THE COURT:** No, which you discuss in your filings, not
4 your pleadings.

5 **MR. MATTERN:** All right. Yes. Thank you, Your Honor.

6 **THE COURT:** We've got law students here and they need
7 to know that there's a difference between pleadings and
8 filings, as do lawyers.

9 **MR. MATTERN:** Thank you for holding me accountable.
10 You're right.

11 As we said in our filings, in *Dyroff* the district court
12 said, "Failure to warn claims not recognized here. It was not
13 a part of negligence."

14 If Your Honor -- I think that this is enough to resolve
15 plaintiffs' theory here, in part because I haven't heard a
16 response for why this should encompass something more than
17 third-party harm; but if Your Honor doesn't buy that, I think
18 we request an opportunity to fully brief this because our first
19 notice of this was in defendants' opposition.

20 **THE COURT:** So you didn't -- you had a reply. Why
21 wasn't it addressed in the reply?

22 **MR. MATTERN:** We addressed it in our reply,
23 Your Honor. We didn't expect that -- we think that we're
24 right, that this should not be recognized because it's not
25 pleaded within 914 and 948 and that this is a form of otherwise

1 what some courts have called shotgun pleading. So that's our
2 argument there.

3 We offered --

4 **THE COURT:** But once they -- once they raised it in
5 the opposition, why is it -- why do you get a second chance
6 when you were given a reply to address the topic?

7 **MR. MATTERN:** We did address it in our complaint.

8 **THE COURT:** You asked for an additional opportunity.
9 I'm asking you why you should be given an additional
10 opportunity when you were already given an opportunity.

11 **MR. MATTERN:** Again, Your Honor, just in case you have
12 a view that reply doesn't count, that we have to make our
13 arguments in our opening motion, I don't -- we don't want to be
14 prejudiced by that.

15 But, second, I think what we have heard from Ms. Scullion,
16 more elaboration about what their theory of failure to warn is.

17 So I, again, think that you can dismiss the theory for the
18 reasons we've alleged. I'm only asking that if Your Honor
19 thinks otherwise, to give us an opportunity to brief it more
20 fulsomely.

21 **MS. SCULLION:** Your Honor, if you'd like to hear more,
22 we did, in fact, in our opposition specifically call out the
23 factual allegations of failure to warn that were incorporated
24 by reference. We also pointed out that this is the second time
25 the plaintiffs have -- I'm sorry -- defendants have failed to

1 engage with the failure to warn claims. It was this case on
2 the initial motion to dismiss as well.

3 And with respect to the substance of failure to warn,
4 again, we have cited to the Restatement Third, which makes
5 clear that a failure to warn is a basic form of negligence.
6 There is no requirement that you only have to warn with respect
7 to third-party conduct.

8 When your actions, your conduct creates a risk of harm, an
9 unreasonable risk of harm, you can fulfill your duty by not
10 doing that or by warning appropriately of the risks that you
11 have created.

12 We have alleged both forms of negligence here, that they
13 failed to conform their conduct and they failed to adequately
14 warn of the risks created by their conduct.

15 **MR. MATTERN:** And, again, Your Honor, we've addressed
16 these specific theories in our papers, and your prior order has
17 said that theories related to third-party harm or third-party
18 bad actors are out. We think a failure to warn claim in the
19 negligence context is limited to those -- to that scenario.

20 And given that in Your Honor's prior order, we think
21 that's enough to say that the failure to warn count -- sorry --
22 the failure to warn theory, to the extent you believe it's a
23 part of this claim, is out.

24 **THE COURT:** All right. Let's move on. What else do
25 you want to talk about in terms of the Count 5?

1 **MR. MATTERN:** So I have a couple more points that I'd
2 like to make, Your Honor. I'm happy to focus on whatever is
3 helpful to you, but maybe to start where we were discussing
4 before is on the point that if you take Your Honor's order and
5 strike out everything that you've said is barred by 230, the
6 First Amendment, or your discussion about third-party harm,
7 what's left is not enough to foreseeably allege a harm that
8 would create a duty.

9 And so plaintiffs primarily point to, just to give you one
10 example to contextualize this, to paragraphs 76 through 90 of
11 the complaint, and this is a passage that almost exclusively
12 discusses what they believe are the methods that platforms use
13 to publish content through algorithms. And so they talk about
14 intermittent variable awards, likes, algorithms, all the things
15 that Your Honor said in the order on the priority claims were
16 out.

17 In our view, those allegations can't be the basis for
18 what's left for the negligence claim; and once you strike
19 those, there's nothing -- there's nothing left to plausibly
20 allege a duty.

21 I do also want to talk about some of our broader
22 arguments, but I want to pause there in case you have
23 questions.

24 **THE COURT:** Any response?

25 **MS. SCULLION:** Your Honor, we certainly did allege a

1 variety of conduct that we think is negligent in causing harm.
2 Again, Your Honor has ruled some of that on 230 and First
3 Amendment; whereas, based on third-party harm, we're not
4 looking to revisit that.

5 But Your Honor specifically also found that with respect
6 to allegations of -- for age verification and parental controls
7 and making it more difficult than it should be to report abuse
8 and CSAM, that, in fact, we do allege theories of harm that are
9 not barred by Section 230, not barred by the First Amendment,
10 and don't depend on third-party conduct.

11 Again, those are incorporated in -- our allegations are
12 incorporated in Count 5 with respect to parental controls.
13 Paragraph 929f. alleges that defendants have developed and
14 operated their platforms in a way that facilitates unsupervised
15 or hidden use.

16 With respect to age verification, we've alleged at 929e.
17 that defendants have adopted protocols that do not ask for or
18 verify the age of the users.

19 And with respect to CSAM and abuse reporting, paragraph
20 929c. alleges that defendants have operated and managed their
21 platforms in a way that exposes children to sexual abuse.

22 And, again, we've incorporated the factual allegations
23 that all defendants have set up their platforms in a way that
24 make it unnecessarily difficult to report CSAM. That's at
25 paragraph 149. There are specific allegations about barriers

1 to reporting with respect to Meta at paragraph 422, Snap at
2 paragraphs 535 and 536, TikTok at paragraph 667, and for
3 YouTube at paragraphs 810 and 811.

4 **THE COURT:** Now, I have addressed this suite of
5 features and they do seem to be incorporated. So to the extent
6 that there's anything left -- some are, some aren't -- anything
7 else to be said with respect to that substantively?

8 **MR. MATTERN:** Yes, Your Honor. I'm making a slightly
9 different point, which is I take the world as it comes, that
10 parental controls, age verification, and the reporting features
11 are still in; but if you look at the specific factual
12 allegations in the complaint, plaintiffs do not tie those
13 specific features to their theory of harm.

14 So to give you an example --

15 **THE COURT:** They don't tie it to negligence?

16 **MR. MATTERN:** That's correct. They don't -- they
17 don't say that the harms that they identify are as a result of
18 issues with these particular features.

19 If I could just offer an example for your consideration
20 just to think about. If you take the example of parental
21 controls, the first time parental controls is mentioned in the
22 complaint is on paragraph 134. So we're already 37 pages into
23 the complaint when parental controls even come up, and the
24 first substantive discussion of it are seven paragraphs later
25 on paragraph 141.

1 When plaintiffs talk about parental controls, they talk
2 about the defects of parental controls facilitating or leaving
3 gaps that predators can, in their view, exploit.

4 What they -- the context in which they discuss parental
5 controls are only related to harms that are out already under
6 this Court's prior order because, again, they deal with issues
7 that are barred by 230 or issues that are out under application
8 of ordinary tort law.

9 I'll pause there.

10 **THE COURT:** Yeah, I don't think that's your strongest
11 argument.

12 Moving along, can I ask? Ms. Scullion, the plaintiffs did
13 give the Court a multistate survey with respect to the standard
14 in various states, but your briefing -- the plaintiffs'
15 briefing focused almost exclusively on the *Roland* standards for
16 California.

17 Is it your perspective that the *Roland* factors are
18 representative or comprehensive of all of the other analytical
19 frameworks used by all of the other states at issue or not?
20 How are there differences, which states, and what are the
21 differences?

22 **MS. SCULLION:** Your Honor, neither party focused on
23 specific states in briefing the duty issue. We do believe that
24 the survey shows that states are looking at substantially the
25 same factors as the *Roland*. So you've got foreseeability of

1 the harm, directness of the conduct to the harm, and public
2 policy concerns.

3 We have focused --

4 **THE COURT:** So my question is --

5 **MS. SCULLION:** Yes.

6 **THE COURT:** -- do I need to do this work or do you-all
7 concede that if I do it under *Roland*, that is going to be
8 sufficient for all of the states?

9 **MS. SCULLION:** Your Honor, we are happy to use those
10 factors for all of the states.

11 **THE COURT:** What about the defense?

12 **MR. MATTERN:** Your Honor, we have a different view
13 about how the law works, and I can explain it briefly.

14 In California there's a -- sort of a default statutory
15 duty and then the *Roland* factors are applied to carve things
16 out of that statutory duty.

17 In defendants' view, negligence operates the flip of that
18 in every other state, which is that there's no default rule;
19 it's the plaintiffs' burden to show that there's a duty.

20 I think, though, for where this comes down in terms of the
21 analysis that you do to determine whether, like, foreseeability
22 and public policy supports a duty, all states apply a version
23 like that. And so I think we think the *Roland* factors are -- a
24 version of that is used by all states, but we think it's an
25 important difference that in every other state there's no

1 default duty.

2 **THE COURT:** So you agree, then, that if I use the
3 *Roland* standard, they are going to be representative of the
4 analytical framework of all of the other states?

5 **MR. MATTERN:** Can I slightly caveat that, Your Honor?

6 I think for purposes of this motion to dismiss, we would
7 accept that, but we would reserve our rights to pre- -- more
8 state-specific arguments in the context of specific cases; but
9 I acknowledge that for purposes of this briefing, the parties
10 did not draw distinctions among all the states.

11 And I do want to note again that California operates
12 differently than other states, that it's still plaintiffs'
13 burden in every other state to establish that there was a duty.

14 **THE COURT:** Isn't it always plaintiffs' burden?

15 **MS. SCULLION:** And, Your Honor, I mean --

16 **THE COURT:** I mean --

17 **MS. SCULLION:** -- in any event, we have met that
18 burden. We have -- we have specifically alleged the duty.

19 **THE COURT:** I understand you think that, but it's just
20 an odd framing because this isn't an affirmative defense. It's
21 a cause of action, and plaintiffs always have the burden on
22 their own cause of action. So I don't understand the
23 distinction that you're trying to make.

24 **MR. MATTERN:** So let me try that one more time,
25 Your Honor.

1 I agree. California, however, has a slightly different
2 application to duty, and you can see this in Judge Kuhl's order
3 in the JCCP. California -- although we agree that it's always
4 plaintiffs' burden, California sort of puts a thumb on the
5 scale for plaintiffs. That's something -- and then the *Roland*
6 factors operate to carve -- to carve the duty out. That's the
7 inverse of what happens in every other state. So that's the
8 distinction I'm drawing there.

9 **THE COURT:** I see.

10 All right. Anything on the *Roland* factors you want to
11 discuss? If not, we'll move on.

12 **MR. MATTERN:** Yes, Your Honor.

13 And so this is -- this comes back to the first point I
14 made, which is just a couple of reasons for Your Honor to
15 consider for why it would be inappropriate in the defendants'
16 view to impose a duty here, and these are some of the -- some
17 things that courts have looked at in applying the *Roland*
18 factors, including, Your Honor, in *Estate of B.H. vs. Netflix*.

19 So we briefed and don't intend to reargue that we think
20 that there are First Amendment issues raised by plaintiffs'
21 theories; and, in fact, Your Honor acknowledged in the motion
22 to -- on the order of the motion to dismiss that there were
23 Section 230 and First Amendment issues.

24 But we think what the important part is courts across the
25 states have sort of applied a constitutional avoidance

1 principle to construing state law in declining to extend torts
2 to encompass conduct that would potentially raise
3 constitutional issues.

4 And so in our view, we don't have to show and you don't
5 have to agree with us that the remaining features necessarily
6 raise First Amendment issues. But we cited before you cases
7 like *Bonta* that deal with age verification, the *NetChoice* cases
8 where courts have enjoined those statutes on First Amendment
9 grounds.

10 And so we think it's clear, and plaintiffs don't really
11 engage, that there are serious First Amendment questions on
12 these issues; and that enough, applying the sort of
13 constitutional avoidance principle to torts, is enough to say
14 that that's a reason why tort law and why duty should not be
15 extended to encompass the kind of allegations plaintiffs make
16 here.

17 **MS. SCULLION:** Your Honor, if we might respond on
18 that.

19 **THE COURT:** Don't interrupt.

20 **MS. SCULLION:** I apologize.

21 **THE COURT:** Have I ever generally not let you respond?

22 **MS. SCULLION:** That is absolutely true. Thank you.

23 **THE COURT:** Don't interrupt.

24 Are you done?

25 **MR. MATTERN:** I'm happy to pause or happy to -- I have

1 a couple more points I'd like to make.

2 **THE COURT:** Go ahead.

3 **MR. MATTERN:** So we also think that applying, like, an
4 ordinary negligence principle here would ensnare courts in
5 difficult line-drawing problems, and these are issues that
6 courts like the *Zamora* court in the Southern District of
7 Florida, which rejected imposing a duty on a broadcaster even
8 though the plaintiff brought an addiction claim, because it
9 said courts are ill-equipped to deal with that. It's something
10 that the Ninth Circuit and Sixth Circuit observed in *Winter* and
11 *Waters* respectively.

12 It's simply that the application of tort law here requires
13 courts to make decisions about platforms that could chill
14 expression in a way that courts really aren't equipped to deal
15 with.

16 And, in fact, I think as an example of this, Your Honor's
17 motion to dismiss order on the priority claims was obviously
18 very thorough and dealt with many different theories parsing
19 sort of theories of what's barred by the First Amendment or
20 what's not or what's barred by federal law or what -- it's a
21 duty is not the kinds of like questions that juries are
22 typically equipped to deal with, which is, again, another
23 policy-based reason why courts have declined to extend tort law
24 in these circumstances.

25 But I'll pause on the public policy factors.

1 **THE COURT:** Response.

2 **MS. SCULLION:** Again, I apologize for interrupting,
3 Mr. Mattern.

4 Your Honor, Mr. Mattern is really just rehashing the First
5 Amendment issues that Your Honor already has pretty carefully
6 parsed in looking at these features.

7 And Your Honor has already observed that our claims do not
8 solely look to the content or the expressive aspects of the
9 platforms. You found that there are theories of liability with
10 respect to parental controls, age verification, CSAM reporting,
11 and other features that do not, in fact, require them to change
12 content or to monitor content.

13 And that distinguishes, for example, Your Honor's ruling
14 in *Netflix* in which I believe you looked at and said the
15 content there was inseparable from the injury. That is not the
16 case here. That distinction also applies with respect to the
17 *Winter*, the *Waters* case, and the others that my colleague has
18 referenced.

19 This case is much more akin to the *Weirum* decision where
20 the radio station was, in fact, potentially liable in
21 negligence for the manner in which it conducted a radio contest
22 that caused physical harm to bystanders.

23 And I -- I apologize.

24 With respect to the public policy issues that pertain to
25 expressive communication platforms, again, we point to the

1 *Weirum* case recognizing that that's not unlimited deference to
2 public policy. And what we know from cases such as the *Ileto*
3 case is that when you're looking at the utility of a service
4 and asking about how that impacts the public policy, you don't
5 ask about the service as a whole; you look to the specific
6 conduct that's being challenged.

7 And here we have alleged that these platforms could have
8 robust age verification, robust working, effective parental
9 controls, and still operate. And, in fact, the hardest thing I
10 have about this argument about age verification, parental
11 controls, CSAM reporting somehow being completely inconsistent
12 with the business of running a communications platform is they
13 purport to have these kind of features already. They purport
14 to do age verification, they purport to have parental controls,
15 and some form of abuse reporting so it can't be completely
16 inconsistent with them having a communications platform.

17 From what I understand, the argument seems to be if we had
18 those -- if we have effective age verification, effective
19 parental controls, effective reporting, that somehow crosses a
20 line. Your Honor, that's going to be a question that the
21 experts are going to weigh in on. There's going to be factual
22 evidence on that, and the jury is going to have to decide what
23 is reasonable. What could these defendants do? Could they, in
24 fact, do it better? And we believe we'll be able to prove they
25 can.

1 **THE COURT:** All right. Let's move on to CSAM. Thank
2 you.

3 **MR. MATTERN:** Thank you, Your Honor.

4 **MS. SCULLION:** Thank you, Your Honor.

5 **MR. SCHMIDT:** Good morning again, Your Honor. Paul
6 Schmidt for Meta.

7 **THE COURT:** Good morning, Mr. Schmidt.

8 **MR. JASINKSI:** Good morning, Your Honor. Matthew
9 Jasinski with Motley Rice for the individual plaintiffs.

10 **THE COURT:** Good morning.

11 All right. Mr. Schmidt, go ahead.

12 **MR. SCHMIDT:** Thank you, Your Honor.

13 I want to start just by saying briefly there's no dispute
14 that these claims involve horrifying allegations in terms of
15 criminal conduct that never should happen by third parties, and
16 obviously our pleadings motion doesn't rest in any way on
17 challenging those contentions. It rests on the very what we
18 think is straightforward application of Section 230 and the
19 statute, and those are the two points that I'll address
20 focusing mostly on Section 230.

21 In terms of Section 230, this case fits squarely within
22 case law recognizing that these types of claims are precluded
23 by Section 230. We cite the *Doe #1* case from the Ninth Circuit
24 that addressed exactly these types of allegations. As the
25 district court decision in that case tells us, the claims there

1 were a duty to report child sexual abuse material. Twitter was
2 notified of the CSAM material, and still knowingly received,
3 maintained, and distributed this child pornography after such
4 notice. Those are the precise allegations here. And the Court
5 said -- the Ninth Circuit said those kind of allegations are
6 covered by Section 230. They are, quote, "per force immune
7 under Section 230."

8 **THE COURT:** I want to stop you.

9 Mr. Jasinski, it seems to me that the plaintiffs' theory
10 here is that the defendants' possession is sufficient to
11 satisfy the cause of action, but their possession is not --
12 only comes through third-party content. So how do you avoid
13 Section 230?

14 **MR. JASINKSI:** Well, I think you're drawing a key
15 distinction, Your Honor. It's the possession that is at issue,
16 not the means by obtaining it.

17 **THE COURT:** How do you get possession without the
18 content from other parties? What do you envision them doing?
19 What do you envision them doing?

20 **MR. JASINKSI:** So our understanding of the law,
21 Your Honor, is that the means by which a defendant comes into
22 possession, and it needs to be knowing possession under the
23 statute, is not relevant.

24 **THE COURT:** Okay.

25 **MR. JASINKSI:** And --

1 **THE COURT:** All right. That's a distinction.

2 Mr. Schmidt, the means by which you get this, not
3 relevant.

4 **MR. SCHMIDT:** I think the case law rejects that point.
5 Section 230 rejects that point. *Doe vs. -- Doe #1* directly
6 addresses that point when the allegation was that Twitter
7 knowingly received, maintained, and distributed the receipt --
8 and the maintenance is what the plaintiffs are alleging here --
9 such content even after receiving notice, which is their
10 allegation here. The verbiage that the Ninth Circuit used in
11 holding that material subject to Section 230 equally applies
12 here.

13 **THE COURT:** Okay. Mr. Jasinski, what case best
14 articulates that the means by which they obtain it is
15 irrelevant?

16 **MR. JASINKSI:** Well, we think that reading comes from
17 the *Barnes* case, from the *Lemon* case, and even from the *Dyroff*
18 case in the Ninth Circuit, Your Honor.

19 **THE COURT:** But none of those cases say what you just
20 said.

21 **MR. JASINKSI:** You're right, Your Honor.

22 **THE COURT:** It's an extension -- you're trying to make
23 an extension of that. None of those cases say that.

24 **MR. JASINKSI:** Hundred percent correct. That is true,
25 Your Honor.

1 **THE COURT:** Okay. So you want me to read *Barnes*
2 and -- what were the other two?

3 **MR. JASINKSI:** *Barnes*, *Lemon*, and actually *Dyroff* and
4 I'd love to speak to *Dyroff*.

5 **THE COURT:** As -- you want me to read those as saying
6 that the means by which they obtain it is irrelevant.

7 All right. So you can reflect on *Dyroff*. I'm not sure
8 that I agree with you, but go ahead.

9 **MR. JASINKSI:** Well, let me use *Dyroff* as an example,
10 Your Honor. In that case, you may recall the issue was that
11 the platform had facilitated a connection between a young man
12 and a drug dealer, and ultimately the young man purchased
13 heroin. It was laced with fentanyl and he died, and his mother
14 brought a claim against the platform.

15 And the Ninth Circuit concluded that the platform is
16 immunized from liability under Section 230 because ultimately
17 the claim was based upon the information that the platform had
18 allowed this third-party drug dealer to communicate and thereby
19 connected the young man and the drug dealer.

20 This is different because it is as though Meta is in
21 possession of the heroin. The CSAM is heroin. Having it in
22 your possession, knowingly having it in your possession, is
23 illegal. So it is not a claim that relies upon publication.
24 Publication is irrelevant.

25 In *Lemon*, for example, although the Snap filter was used

1 to create a post, the court said that it didn't -- at the end
2 of the day the claim didn't rely in any way upon that post
3 being published. It didn't matter whether it was published.

4 The same is very true here, Your Honor. And I could offer
5 the Court a hypothetical, which is similar to the *Batzel* case,
6 which is another Ninth Circuit case, an early one.

7 Imagine that somebody sends an e-mail to Meta containing
8 CSAM and says "I'm attaching child pornography that I would
9 like you to post on Meta," and the Meta employee reviews the
10 material, it is unmistakably CSAM, and makes the editorial
11 decision to post it.

12 I take it Meta would say that in that scenario it's
13 immunized because it made an editorial decision about posting
14 third-party content. And I would say it's --

15 **THE COURT:** Hold on. Would you -- I'll let you
16 respond, but would you say that it's --

17 **MR. SCHMIDT:** I don't know. That's not the question
18 before the Court. There's no such allegations in this case.
19 The allegations in this case are not *Dyroff*.

20 **THE COURT:** So you don't want to respond to the
21 hypothetical. Keep going.

22 **MR. SCHMIDT:** It is hypothetical. It has nothing to
23 do with the pleadings within the complaint.

24 **THE COURT:** So you don't want to respond, that's fine.
25 Go ahead.

1 **MR. JASINKSI:** I can understand Mr. Schmidt's
2 reluctance to respond because I think if you look at the *Batzel*
3 case, the argument would have to be that it's immunized under
4 Section 230 because it was provided to Meta for purposes of
5 posting and Meta decided to post it.

6 But the critical difference is the knowing receipt and
7 possession of CSAM is itself a crime that is unlike
8 receiving -- that is unlike receiving defamatory content or
9 other content. Albeit not protected by the First Amendment,
10 defamatory material is not criminal in nature.

11 **THE COURT:** Where do you discuss *Batzel* in your
12 filing?

13 **MR. JASINKSI:** Your Honor, *Batzel* is not in these
14 briefs. It's a case that was presented to the Court earlier in
15 the earlier round of briefing, but my hypothetical is based on
16 that -- on the scenario in that case, Your Honor.

17 **THE COURT:** Okay. What else?

18 **MR. SCHMIDT:** Your Honor, if I may respond to that.

19 **THE COURT:** Go ahead.

20 **MR. SCHMIDT:** Thank you.

21 Not only is *Batzel* not cited, *Dyroff* is not cited.
22 There's no argument based on *Dyroff* in the pleadings -- in the
23 filings nor is there any argument that *Dyroff* allows this type
24 of claim to proceed. Just this case is different than *Dyroff*,
25 which is why it wasn't cited. *Lemon* isn't cited.

1 What is cited are a host of cases both from the Ninth
2 Circuit and the *Doe #1* decision and from various district
3 courts around the country that address this direct question or
4 analogous questions, cases both within the Ninth Circuit and
5 outside the Ninth Circuit, and find that these kind of
6 allegations are clearly barred by Section 230.

7 That case law in turn is consistent with broader case law
8 in the Ninth Circuit and outside the Ninth Circuit recognizing
9 that the mere fact that content might be criminal doesn't
10 change the Section 230 analysis because otherwise Section 230
11 would mean nothing.

12 The *Carafano* case from the Ninth Circuit, for example,
13 involved cruel and sadistic identity theft that led to
14 horrifying threats against a woman. That was covered by
15 Section 230.

16 In *Doe 1* itself quoting *Gonzalez vs. Google*, the Ninth
17 Circuit addressed this point about whether illegal content
18 takes an allegation outside of Section 230, and it did so
19 because, of course, Section 230 itself has an exception to its
20 applicability where there's a criminal charge being brought.

21 The Ninth Circuit said that limitation on Section 230
22 immunity extends only to criminal prosecutions and not to civil
23 actions based on criminal statutes, and there's a host of cases
24 that recognize that proposition.

25 All of those cases are consistent with a baseline purpose

1 of Section 230 and with the formulation of the 230 test the
2 court -- the 230 test that the Ninth Circuit and every other
3 circuit has repeatedly recognized.

4 In terms of the policy underlying Section 230, the Court
5 we think rightly recognized in its earlier 230 ruling that one
6 of the policies, one of the core policies, under Section 230
7 was to not provide an adverse incentive, not to monitor or
8 remove any harmful content from their websites. That policy is
9 implicated with a claim like this which says "You're not doing
10 enough. You should be doing more."

11 **THE COURT:** So you make a number of arguments, and I
12 just want to go through these quickly.

13 First, Meta argues that plaintiffs do not allege that it
14 had actual knowledge that it received or possessed any instance
15 of CSAM. That's at 22.

16 **MR. SCHMIDT:** Yes, Your Honor.

17 **THE COURT:** Do you agree with that? And if not, what
18 paragraphs in the complaint suggest or allege otherwise?

19 **MR. JASINKSI:** You're going to have to forgive me,
20 Your Honor, because I thought your question was directed to
21 Mr. Schmidt initially. So could you repeat it for me?

22 **THE COURT:** Well, it was addressed to him initially.
23 He confirmed.

24 So plaintiffs do not -- Meta argues plaintiffs do not
25 allege that Meta had actual knowledge that it received or

1 possessed any incidents of CSAM. If you don't agree with that,
2 what paragraphs allege -- make those allegations?

3 **MR. JASINKSI:** I don't agree with that. I'm going to
4 answer the Court's question. I also don't think that that is
5 relevant to the Section 230 inquiry.

6 But bear with me a moment, and I'll address the
7 paragraphs.

8 (Pause in proceedings.)

9 **MR. JASINKSI:** So there are two components, of course.
10 It's possession and knowing possession. I think that the
11 complaint -- and we incorporate many paragraphs by reference in
12 the New Mexico complaint -- are replete with examples of where
13 Meta has possession of CSAM. The New Mexico Attorney General's
14 Office had done an extensive investigation into this, and there
15 are a number of paragraphs cited in that complaint that we
16 cross-reference that reflect that.

17 We also allege, for example, I'll direct the Court --
18 these are just paragraphs I have written down -- to paragraphs
19 173 and 418 of our complaint, 167 of the New Mexico complaint.

20 Meta was told by law enforcement victims and press reports
21 about the prevalence of child pornography on its platforms.
22 I'm citing our complaint at 412, New Mexico at 74, New Mexico
23 at 198, our complaint at 416.

24 I mean, Meta even sometimes warns users the content may
25 contain images of child sexual abuse, and that's in New Mexico

1 at 183.

2 There are a number of allegations in the master complaint.
3 Now, they are general. And I know that Meta takes issue with
4 the fact that we also in our brief point to individual
5 short-form complaints that tell individual plaintiff stories.
6 But the reason for doing so, Your Honor, is because there are
7 general arguments -- of course, 230 is one of them -- that
8 apply to everybody with respect to this issue.

9 But ultimately the victim of the CSAM is the one who has
10 the claim, and so there are examples in the short-form
11 complaints of individuals who allege having made specific
12 reports to Meta about the presence of their CSAM on the
13 platform.

14 **THE COURT:** So, Mr. Schmidt, I'm not looking at those
15 paragraphs right now and I'm trying to tease this out.

16 You say that there's no allegation of possession or
17 receipt. If I find differently, how does that affect your
18 argument given that I thought your argument was different? And
19 that is, that whether or not you possess it, it's still --
20 you're still immune.

21 But is there something -- it's hard to believe that the
22 defendants don't know it's there. I think there probably are
23 allegations that you know it's there. I don't know if that
24 means you possess it if it's -- but tease that out.

25 **MR. SCHMIDT:** Sure. I think there's two responses to

1 the question Your Honor is asking, and they go to the two
2 separate arguments we're making, Section 230 and then the
3 actual statutory requirement itself.

4 In terms of Section 230, these arguments don't matter.
5 They're exactly what every court has addressed; that when a
6 service only has this material because the user posts it, that
7 is publisher-type activity. That's the heartland
8 publisher-type activity that is a claim in the words of
9 *Roommate.com* "to exclude material that third parties seek to
10 post online."

11 And Your Honor's earlier decision, that's a claim that
12 seeks to hold the company liable for harmful content not
13 otherwise removed. So that's the Section 230 part of the
14 answer.

15 In terms of the statute itself, our argument is that the
16 knowledge that's required is not the knowledge that there's
17 some possibility of CSAM across a master service. If that were
18 enough, that's always a possibility with any service no matter
19 how many efforts they take. In fact, the recognition of that
20 fact is why Section 230 exists because that's always possible
21 and we don't want to disincentivize efforts to address that.

22 What they need to show is actual knowledge of a specific
23 piece of CSAM in terms of explicit material and child material,
24 and that's not what they plead. What they plead is "You don't
25 respond to notices. You must know it's out there somewhere."

1 Not a specific instance. That's what we think the statutes
2 required.

3 They don't have any contrary case, and that's why we think
4 they've got to turn to the short-form complaints to try to
5 prove this point when those complaints aren't properly before
6 the Court under the procedure Your Honor has set for us, at
7 least as to Meta.

8 **THE COURT:** Well, you're not bringing the motion as to
9 the short-form complaints.

10 **MR. SCHMIDT:** That's correct, Your Honor.

11 **THE COURT:** So the short-form complaints may have
12 these counts because -- is that where we're landing? -- because
13 if, for instance, a plaintiff expressly sent a notice to the
14 defendant that said, "This is here, you need to take it down,"
15 and a defendant refused, is that sufficient under the statute?

16 **MR. SCHMIDT:** That's --

17 **THE COURT:** Because now you know and you possess and
18 you still possess because you didn't take it down.

19 **MR. SCHMIDT:** Yeah, it's clearly not sufficient under
20 Section 230. That was directly the allegation in *Doe 1 vs.*
21 *Twitter*. That's been the allegation in other cases. That's an
22 allegation that's repeatedly made as to all kinds of content
23 under Section 230 where law from this circuit and courts around
24 the country say notice liability doesn't change, Section 230
25 claims of notice don't change Section 230. It would be a

1 radically different statute if it did.

2 And in terms of notice under the CSAM statute, that, I
3 think, is a question that's not here because that's not pled in
4 the master complaint, which is all we're moving on.

5 **THE COURT:** Response.

6 **MR. JASINKSI:** I'm not entirely sure, Your Honor, how
7 Meta proposes that the Court would dismiss these counts from
8 the master complaint but then acknowledge that individuals may
9 bring these claims in the short-form complaints under the same
10 theories.

11 I mean, I agree in principle with Mr. Schmidt that
12 ultimately the question is knowing possession or knowing
13 receipt. And so the issue of generalized knowledge I think
14 goes to the fact that you can have deliberate ignorance, as we
15 describe in the briefing. We think that Meta is not allowed to
16 stick its head in the sand.

17 But there are also going to be, and are, there are
18 individual plaintiffs who in their short-form complaints will
19 be able to make the allegation that they specifically notified
20 Meta and that that information was not taken down.

21 But there are examples of that as well particularly in the
22 New Mexico Attorney General's complaint. I mean, there are
23 examples of where the investigators scraped Meta for CSAM and
24 identified it.

25 So, you know, I don't -- I think the two work in tandem,

1 Your Honor -- the second amended complaint, master complaint,
2 and these short-form complaints -- when you have the types of
3 claims like these, which by their nature are going to require
4 additional individualized facts that only these individual
5 plaintiffs can provide.

6 **THE COURT:** So a response. How is it that I can grant
7 the motion where you acknowledge that individual plaintiffs
8 may, who by the nature of how this process works -- right? --
9 they've adopted the master complaint as the baseline and
10 provided additional allegations to support the claim? What are
11 you suggesting?

12 **MR. SCHMIDT:** Yeah, I think it's very important that I
13 state my position clearly. I'm not acknowledging that they
14 state a claim. I'm taking the position based on CMO3, which
15 directed the briefing in these cases, that it's not before the
16 Court. It's not properly before the Court.

17 We asked early on to brief short-form complaint issues.
18 The plaintiffs opposed that, and in CMO3 the Court directed us
19 to focus on the master complaint, which is what we've done.

20 **THE COURT:** Are there any bellwether plaintiffs that
21 have CSAM allegations?

22 **MR. JASINKSI:** I'm looking behind me, Your Honor,
23 because I don't know the answer to that question.

24 **MR. SCHMIDT:** I don't understand there to be any. I
25 might be wrong, but I don't -- I don't think there are,

1 Your Honor.

2 **THE COURT:** How many -- how many of the plaintiffs
3 have additional allegations with respect to CSAM?

4 **MR. SCHMIDT:** 31, Your Honor.

5 **THE COURT:** 31?

6 **MR. SCHMIDT:** May I just say, when Your Honor has a
7 moment, one more thing in response to Your Honor's question?

8 **THE COURT:** Sure.

9 **MR. SCHMIDT:** I do think ultimately the Section 230
10 bar will govern the various short-form complaints absent
11 something really unusual that we haven't seen that's not before
12 the Court, and the reason for that is the core argument that's
13 being made to get around Section 230 is the one that the
14 Section 230 test rejects. The test is where liability is based
15 on excluding material that third parties seek to post online.
16 That's the core of the complaint here, whether drawing on cases
17 from outside the CSAM context or cases applying that principle
18 in the CSAM context holding --

19 **THE COURT:** Do you know, Mr. Schmidt, whether the
20 30-odd short-form complaints, are those all brought by a
21 particular law firm?

22 **MR. SCHMIDT:** I don't know that they are, Your Honor.

23 **THE COURT:** All right. Ms. Hazam is saying, no, it's
24 not. Okay.

25 (Pause in proceedings.)

1 **THE COURT:** Okay. Well, I'll figure out whether or
2 not I can tease that out at this juncture.

3 Anything else?

4 **MR. JASINKSI:** I have some responses, if I may,
5 Your Honor. I don't want to --

6 **THE COURT:** Go ahead.

7 **MR. JASINKSI:** First, just to address the *Doe vs.*
8 *Twitter* case, it is a Ninth Circuit decision. It's unreported.
9 It's nonprecedential. The lodestar in that case was a TVPRA
10 claim, the trafficking statute.

11 I grant you that, and Mr. Schmidt, that the case says what
12 it says. We think it's wrong, wrongly decided, not consistent
13 with Ninth Circuit precedent, and not a case that Your Honor
14 should follow. The analysis in the *MG Freesites* in the
15 Northern District of Alabama we think has it right. Receipt
16 and possession are alone criminal acts and not shielded by
17 Section 230. And we think this flows from *Barnes*, and *Barnes*
18 is a case that we've all focused on and Mr. Schmidt's mentioned
19 today. So let me -- let me talk about that just briefly, if I
20 may.

21 In *Barnes*, the Ninth Circuit explained that courts must
22 examine each claim to determine whether a plaintiff's theory of
23 liability would treat a defendant as a publisher or speaker of
24 third-party content.

25 Section 230 thus bars liability when the duty that the

1 plaintiff alleges the defendant violated derives from the
2 defendant's status or conduct as a publisher or speaker.

3 Here it does not derive from that. It derives from the
4 receipt and possession. I understand that the receipt may come
5 by the instantaneous publication of third-party users, but the
6 claim is not based upon the fact of publication.

7 And as I tried to tease out in my hypothetical, the notion
8 that when -- that if Meta were to receive a post for
9 publication via e-mail, it could be liable for knowingly
10 possessing CSAM in the period during which it possessed it
11 before it published it but then have immunity by publishing it,
12 I would submit is absurd and not the intent of the Congress and
13 not what the plain language of the statute or Ninth Circuit
14 precedent requires.

15 **THE COURT:** It would seem to me that with respect to
16 the 30-plus short-form complaints, that there are overarching
17 principles upon which the lawyers have brought those claims
18 that would allow for briefing on the issue. That is, each of
19 the individual facts might be different, but that's not really
20 the question. The question is possession, notification, and
21 other more general principles. Would you disagree with that
22 approach or with that assessment?

23 I haven't looked at them, but the statute is the
24 statute --

25 **MR. JASINKSI:** Right.

1 **THE COURT:** -- and the defendants are one step removed
2 from the content. So there has to be some kind of analytical
3 thread upon which those claims are being brought.

4 **MR. JASINKSI:** And that is true, Your Honor. I would
5 say I -- of course I agree with Mr. Schmidt that the
6 Section 230 issue is a gating issue, and we think we prevail on
7 that. I'm not sure the extent to which -- unless an
8 individual -- well, if Your Honor concluded that it matters how
9 Meta receives CSAM and if it receives it by a post, that that's
10 barred, then I suppose an individual plaintiff would have to
11 show there was CSAM that arrived some other way.

12 But I do think --

13 **THE COURT:** Well, isn't that -- isn't that all that I
14 have in front of me?

15 **MR. JASINKSI:** Yes, I think so. But, I mean, I guess
16 the point, Your Honor, is that on that issue we think you can
17 conclude Section 230 does not bar the claims as alleged in the
18 second amended complaint.

19 We also believe the second amended complaint alleges
20 knowledge of possession -- possession and knowledge, but grant
21 you that those are largely generalized allegations, and so
22 there will be more specific allegations that each individual
23 plaintiff in their short-form complaints needs to proceed on.

24 **THE COURT:** Assume for purposes of argument that I
25 don't think that there is sufficient allegations in the

1 complaint. Part of me is -- you know, part of this is
2 operating blind as to what else is out there. Do I need to
3 have additional briefing with respect to what the individual --
4 individual plaintiffs are asserting?

5 **MR. JASINKSI:** With respect to briefing, Your Honor,
6 we identified five short-form complaints in our brief and
7 they're short. I don't know that the Court needs more
8 briefing.

9 **THE COURT:** Okay.

10 **MR. JASINKSI:** If the Court thinks that the master
11 complaint needs more allegations, of course we could, if
12 Your Honor gave us leave, amend and include those examples in
13 it, but I think that would be form over substance.

14 **THE COURT:** Mr. Schmidt.

15 **MR. SCHMIDT:** I don't think the short-form complaints,
16 which are not before the Court, are going to be able to
17 overcome Section 230. The only allegations about Meta's,
18 quote, "possession" as alleged of this material is because a
19 third party posted it in Meta's capacity as a publisher.
20 That's it. Nothing like the hypothetical, which would never
21 happen in real life, nothing in terms of any other form of
22 misconduct, and that's what places this so squarely within
23 Section 230.

24 **THE COURT:** Yeah. I think what -- and I'll go back
25 and look -- what concerned me is your view that there was no

1 allegation of actual knowledge and that you were somehow
2 resting on that, or no allegation of possession and that you're
3 resting on those issues as part of other issues. Because it
4 does seem to me that there is knowledge and it does seem to me
5 that there is possession, but it may be irrelevant.

6 So the question is: Can you still get there if I disagree
7 with your view that you've taken that you had no knowledge? I
8 just don't think that that's -- I think that's a bit
9 disingenuous.

10 **MR. SCHMIDT:** Yeah, I would say two things on that.
11 Yes is the answer to Your Honor's question, and the yes is
12 Section 230 which addresses allegations of knowledge,
13 allegations of notice, and says that's not enough.

14 And all of Section 230 case law outside of this context
15 dealing with other kinds of problematic content, terrible
16 content, makes the same point. Knowledge doesn't change or
17 allegations of knowledge, which is what we have here, don't
18 change the Section 230 analysis. So that's the first answer is
19 yes to Your Honor's question, we don't need to depend on the
20 knowledge point.

21 But in terms of just to be precise in what we're trying to
22 argue on the knowledge point, what the plaintiffs seem to be
23 pleading, as we understand it, and they make this point in
24 their opposition both by invoking circumstantial evidence and
25 by then invoking short-form complaints that aren't before the

1 Court, what they seem to be pleading is that at a certain level
2 you must know something is out there.

3 That's not our argument. Our argument is: The statute
4 requires specific knowledge of a specific child of specific
5 sexual content, and that's not pled in the complaint. And if
6 what they're saying were enough, we'd have a whole lot of cases
7 applying the statute in this type of setting. We don't have
8 any.

9 **THE COURT:** But what I'm saying -- and, again, I
10 haven't seen all of the short-form complaints. What I'm saying
11 is that it could be -- right? -- in a short-form complaint that
12 the defendant was put on notice that there was and, therefore,
13 because they're on notice, they have knowledge of a specific
14 child of specific sexual content on their platform.

15 **MR. SCHMIDT:** And that's where my first answer kicks
16 in, the Section 230 answer. That wouldn't change the 230
17 analysis because the notice is in the capacity as a publisher
18 where the claim is you need to remove something. That's the
19 heartland of Section 230. Whether there's notice or not is the
20 Ninth Circuit and I believe every other circuit to address the
21 issue has found.

22 **THE COURT:** All right. I'll go back and look.

23 Let's go ahead and move to Count 16 through 18.

24 **MR. SCHMIDT:** Thank you, Your Honor.

25 **MR. JASINKSI:** Thank you, Your Honor.

1 **MR. SCHMIDT:** Your Honor, I don't mean to speak for my
2 colleague from Snap, but did Your Honor want to hear the
3 companion Snap arguments on this issue, which do go to
4 short-form complaints?

5 **THE COURT:** I don't -- well, is there anything else
6 that needs to be said, Mr. Blavin? I think the issues are the
7 same.

8 **MR. BLAVIN:** Your Honor, we agree that the issues are
9 the same, that Section 230 would apply here and bar those
10 short-form complaints.

11 And I would just note that the short-form complaints with
12 respect to the CSAM allegations against Snap -- and these are
13 the DHKS and Doe complaints -- are dedicated to describing
14 criminal acts of third parties who generated and published this
15 content on Snapchat in contravention of Snap's own policies,
16 and that the only allegations as to Snap here concern the
17 third-party publication of that content and Snap's alleged
18 failure to remove it.

19 But there's no allegation whatsoever in those short-form
20 complaints that describe any, quote/unquote, "possession"
21 separate and apart from Snap's publication of third-party
22 content. So I just want to make that clear, that this isn't,
23 you know, an allegation which, you know, someone in the
24 corporate suite was posting or storing CSAM on corporate
25 servers. It's part and parcel of Snap's role as a publisher of

1 third-party content; and for the reasons Mr. Schmidt
2 articulated, Section 230 would equally bar those claims.

3 I also just want to make one point, Your Honor, that
4 plaintiffs' counsel noted that the *Doe 1 vs. Twitter* case is
5 unpublished. Of course, it's still highly persuasive precedent
6 that the Court should follow. It specifically involved a
7 possession claim. The Ninth Circuit specifically said that
8 Section 230 barred, quote, "a viable claim for possession and
9 distribution of CSAM."

10 So the Court was already addressing this argument that
11 possession could stand apart but, moreover, that case was
12 following a preexisting published Ninth Circuit decision, *Doe*
13 *vs. Reddit*. It cited that case in its decision. And *Doe*,
14 again, held that Section 230 applied to claims regarding
15 Reddit's alleged failure to remove CSAM.

16 So for both of those reasons, Your Honor, we think the
17 analysis should apply equally to the short-form complaints
18 asserted against Snap.

19 **THE COURT:** Okay. Thank you.

20 **MR. JASINKSI:** Your Honor, Matthew Jasinski.

21 And I'm going to defer to my cocounsel, Mr. Marsh, on this
22 Snap-specific piece, but I did want to address Mr. Blavin's
23 remark on the previous argument that I had with Mr. Schmidt.

24 We don't think that *Reddit* is an appropriate case to point
25 to here. The claim addressed on appeal in *Reddit* was

1 exclusively the plaintiffs' claim under the TVPRA. That's the
2 trafficking statute. That statute does not bar knowing
3 possession of child pornography but, more broadly, imposes
4 liability on anybody who knowingly benefits from participation
5 in a sex-trafficking venture. So I think that's a much broader
6 claim, and I don't think *Reddit* provides much guidance.

7 And I'll ask Mr. Marsh to address Snap specifically.

8 **MR. MARSH:** Good afternoon, Your Honor -- good
9 morning, Your Honor. James Marsh from the Marsh Law Firm
10 representing the plaintiffs on the Snap short-form complaints.

11 Snap today says that they are not liable because third
12 parties gave them contraband. We've been hearing that excuse
13 since the Garden of Eden, Your Honor.

14 Let me try to articulate our claims in a way that is --

15 **THE COURT:** So I've already had a lot of argument on
16 this. I need you to be specific to Snap.

17 **MR. MARSH:** Yes.

18 **THE COURT:** We don't have all day.

19 **MR. MARSH:** Specifically with Snap, in our papers we
20 address three statutes: 2258A, 2252 and 2252A, and 2255. This
21 is how those statutes work in combination to result in
22 negligence on behalf of Snap.

23 It is Snap's failure to report under 2258A, which is a
24 mandatory reporting statute that results in their possession of
25 CSAM under Section 2252 and 2252A, that creates their liability

1 under Section 2255.

2 We have specific allegations in our short-form complaints
3 that talk about these statutes and how they work together to
4 create liability on behalf of the defendants.

5 In terms of knowledge, I think it's something that bears
6 discussing. There's been a lot of talk here about knowledge.
7 Section 2255, which is a statute that I helped create back
8 20 years ago, creates liability based on criminal predicates of
9 which 2252 and 2252A are. I'm sure Your Honor is very familiar
10 with these in the CSAM cases that come before this court.

11 Those statutes, 2252 and 2250A -- 2252A, are criminal
12 statutes that need to be proven in a civil context by a
13 preponderance of the evidence, not by beyond a reasonable doubt
14 as in the criminal context.

15 If the Court finds possession under those statutes because
16 the defendants have not invoked or exercised their safe harbor
17 under 2258A, which is the reporting statute, then they have
18 liability for possession.

19 What's really important and that we speak about in our
20 papers are the various ways under criminal law for a defendant
21 to have knowledge; and, again, that knowledge being based on a
22 preponderance of the evidence and not by beyond a reasonable
23 doubt.

24 So as we articulate in our papers, willful blindness is a
25 form of actual knowledge. That's a United States Supreme Court

1 case, criminal case, and actual knowledge can be proved through
2 inference from circumstantial evidence. Again, these are
3 criminal cases. That's a Ninth Circuit case, *Gunther*.

4 Companies cannot escape the reach of federal statutes by
5 deliberately shielding themselves from clear evidence of
6 critical facts that are strongly suggested by the
7 circumstances. And, in fact, circumstantial evidence can be
8 used to prove any fact, including facts from which another fact
9 can be inferred. That's a Ninth Circuit criminal case.

10 And we also discuss a specifically CSAM case, that
11 evidence that a person has searched for CSAM on the internet
12 and has a computer containing child pornography images can
13 count as circumstantial evidence. This includes evidence of
14 material on a cache. Knowledge can also be imputed when a
15 defendant has not viewed CSAM. That's a criminal case, *United*
16 *States vs. Ruiz Castillo*, Ninth Circuit 2020.

17 Actual possession exists when there's direct physical
18 control over a thing. That's United States Supreme Court case
19 *Henderson vs. United States*.

20 And constructive possession is established when a person,
21 the lacking such physical custody, still has power and intent
22 to exercise control over the object. That's a Ninth Circuit
23 criminal case *Vasquez* and an Eleventh Circuit case *Little*.

24 So when we're talking about whether or not the plaintiffs
25 have made out an adequate case of knowledge and whether or not

1 the defendants exercised their safe harbor obligations, I think
2 we have more than shown what we need to show under 2255 for a
3 violation of 2252, 2252A, and their failure to report under
4 2258A.

5 **THE COURT:** Response.

6 **MR. BLAVIN:** Yes, Your Honor. In *Doe vs. Twitter*, it
7 involved a 2252A claim just like the claim asserted here
8 involved allegation of notice, knowledge, and possession, just
9 as like those asserted here, and the Ninth Circuit held, again
10 following *Doe vs. Reddit*, that 230 barred that claim. So the
11 recitation of the various criminal elements were considered and
12 rejected by the Ninth Circuit in applying Section 230.

13 Very briefly, Your Honor, because he mentioned -- the
14 plaintiffs' counsel mentioned 2258A, which is the reporting
15 element of CSAM. First of all, none of the short-form
16 complaints at issue assert that as a standalone cause of
17 action. It was in the original master complaint. It was
18 withdrawn from the master complaint as to Snap. It has not
19 reasserted in the short-form complaints.

20 But, moreover, plaintiffs could not bring a standalone
21 Section 2258A claim because the statute does not provide for
22 private right of action, and multiple courts have held that.
23 The *Doe vs. Twitter* case, the Northern District held that
24 although Section 2258A establishes a duty to report under
25 criminal law, that section does not purport to establish a

1 private right of action. The *Mindgeek* case cited in our papers
2 from the Central District of California held the same.

3 But, again, that claim is not even asserted in the
4 short-form complaints applied against Snap. It's just raised
5 in the briefing.

6 But, Your Honor, at the end of the day, Section 230
7 plainly bars these claims regardless of whether the plaintiff
8 could theoretically raise or sufficiently plead a technical
9 violation of these statutes.

10 But I would just say briefly on the merits, Your Honor, no
11 court has ever recognized a 2252 or 2258A claim based on the
12 allegations which are alleged here, which, again, as to Snap,
13 involve nothing more than its role as a publisher of
14 third-party content. I mean, the courts have held that
15 Section 230 barred those claims, but even --

16 **THE COURT:** Slow down, Mr. Blavin.

17 **MR. BLAVIN:** Yes, Your Honor. I apologize.

18 But even apart from that, if you look at the actual cases
19 which have held that there is a 2252A claim or 2252 claim,
20 these cases involve situations where the platforms materially
21 contributed to the creation of CSAM. And these were really
22 porn website operators such as the *MG Freesites* case, the *Doe*
23 *vs. Mindgeek* case. And these cases involved allegations of
24 creating thumbnails for videos, creating and suggesting tags
25 indicating CSAM for uploaders to use, and instructing users to

1 use titles and tags indicating CSAM to attract more users.
2 There's just absolutely zero allegations in the complaint
3 anything approaching that type of activity as to Snapchat.

4 **THE COURT:** All right. Let's move on.

5 **MR. MARSH:** May I respond briefly, Your Honor?

6 **THE COURT:** No.

7 **MR. MARSH:** Thank you, Your Honor.

8 **THE COURT:** Counts 15 through 18.

9 You're welcome.

10 **MR. TELLIS:** Good morning, Your Honor. Roland Tellis
11 on behalf of the plaintiffs.

12 **MS. LANGNER:** Good morning, Your Honor. Bailey
13 Langner with King & Spalding for the defendants.

14 **THE COURT:** All right. You may proceed, Ms. Langner.

15 **MS. LANGNER:** Thank you, Your Honor.

16 Your Honor, there are a few things I'd like to address
17 today. First, I'd like to talk about why this Court should
18 address now the claims for loss of consortium, wrongful death,
19 and survival actions. There was a suggestion in plaintiffs'
20 brief that that -- these rulings should be deferred.

21 I would next like to discuss the derivative nature of
22 these claims and what that means for purposes of this motion.

23 And then, finally, I will turn to several separate
24 independent reasons why loss of consortium claims brought by
25 plaintiffs in certain states in this MDL should be dismissed

1 outright.

2 There are three reasons why it is necessary and
3 appropriate to rule on loss of consortium, wrongful death, and
4 survival actions at this time, and the Court should reject
5 plaintiffs' request to brief these issues individually later
6 on.

7 First, plaintiffs put these issues -- these claims at
8 issue now by including them in their master complaint.
9 Plaintiffs could have individually pleaded these three causes
10 of actions in their short-form complaints and left them out of
11 the master complaint, but they chose not to do that.

12 Second, Your Honor, there are a substantial number of
13 cases that include these claims. By defendants' count, today
14 there are 107 cases involving loss of consortium claims out of
15 268 personal injury cases in the MDL, as an example. These
16 issues are cross-cutting and should be decided now.

17 And then, finally, Your Honor, deciding these issues now
18 will have the practical effect of streamlining discovery. As
19 you know, discovery is underway in all of these matters; and of
20 the 12 bellwether --

21 **THE COURT:** Any of the -- yeah, that's what I was
22 going to ask. Do any of the bellwethers have these?

23 **MS. LANGNER:** Yes, Your Honor. Of the 12 bellwether
24 cases, there are five of loss of consortium claims brought by
25 parents, and four out of five of those cases were brought under

1 state laws requiring dismissal of the loss of consortium
2 claims.

3 There's one plaintiff parent located in Georgia, which
4 limits loss of consortium to spouses only. There are two other
5 plaintiff parents that are in New York and Virginia
6 respectively, and both of those states have rejected filial
7 loss of consortium claims that are claims -- that is claims
8 brought by parents for loss of consortium.

9 And then, finally, a fourth parent is in Illinois, and
10 Illinois only permits loss of consortium claims in cases
11 involving the death of a child, and there is -- there's no
12 death of a child in that Illinois case.

13 Dismissing the claims now would mean, for example, that
14 these plaintiff parents do not have to prove loss of
15 consortium, they do not have to provide deposition testimony on
16 that subject; and, understandably, those are often difficult
17 and sensitive topics. Dismissing the claims now would avoid
18 having the parents to testify on those claims.

19 Taking a step back, Your Honor, a broader point, as we
20 point out in our brief, loss of consortium, wrongful death, and
21 survival actions are all derivative claims. They are
22 derivative of the decedent or injured plaintiff's personal
23 injury claims.

24 If the underlying personal injury claim is dismissed or
25 limited, any loss of consortium, wrongful death, or survival

1 action should likewise be dismissed or limited. None of this
2 is in dispute, Your Honor, and what we are asking for at this
3 time is that the Court issue an order to that effect, an order
4 stating that to the extent a personal injury plaintiff's claims
5 are dismissed or limited based on Your Honor's prior motion to
6 dismiss ruling or any order flowing from argument today, that
7 the derivative claims are likewise dismissed or limited.

8 **THE COURT:** Look, these claims seem to be relatively
9 straightforward with respect to what the states require. If
10 there's no claim, there's no claim. I don't know why I
11 wouldn't rule. I certainly think that with respect to any
12 bellwether, those need to be resolved sooner rather than later.

13 When I am looking at 50 different states, those are
14 obviously going to -- it's going to take a long time or perhaps
15 it just makes -- we just need to make sure that we understand
16 the state's law.

17 I was surprised when I saw these claims to begin with.
18 It's not what I would typically think of as loss of consortium,
19 but response.

20 **MR. TELLIS:** The reason, Your Honor, we thought this
21 was better dealt with on an individual basis, because there's a
22 qualitative nature of a loss of consortium claim. Did the
23 child die? Did the child not die? Were there allegations of
24 comfort, support services, et cetera, that can't be gleaned
25 from the master complaint? That was the reason we suggested

1 these would be better served on an individual basis.

2 But we don't dispute or quibble with the notion that these
3 are derivative in nature and there has to be wrongful conduct.
4 And if Your Honor says there's no wrongful conduct, they can't
5 form the basis of the complaint; but that may be a basis to
6 limit the claims, but not a basis to dismiss them because as
7 Your Honor has already held, we have viable claims here.

8 **THE COURT:** So do you disagree, though, that the
9 following states do not allow as a matter of law consortium
10 claims brought by nonqualified family members --

11 **MR. TELLIS:** Right. So --

12 **THE COURT:** -- Alabama, California, Connecticut,
13 Delaware, Georgia, Indiana, Kansas, Maine, Maryland, Michigan,
14 Minnesota, Mississippi, Missouri, New Hampshire, New York,
15 North Carolina, Pennsylvania, South Dakota, Virginia, or the
16 District of Columbia?

17 And, by the way, I don't even know if I have plaintiffs
18 from all those states. So I certainly am not particularly
19 interested in not resolving an actual issue. If there are no
20 plaintiffs from these states, I don't know why it would be
21 briefed.

22 But do you disagree that those states have specific
23 qualified family members; and if you don't have one, there is
24 no claim?

25 **MR. TELLIS:** No. No, we don't -- we don't disagree.

1 But the point we made was that the confusion in the cases as
2 you get down into the granular state law is that some states
3 recognize loss of consortium as a standalone claim, others
4 don't but permit consortium -- loss of consortium type remedies
5 to be recovered through other claims, wrongful death,
6 et cetera.

7 Our point was simply we don't -- we don't -- if there's a
8 state's law that says a parent cannot bring a standalone loss
9 of consortium claim for the loss of a child, of course we don't
10 dispute that other than to say that if you dismiss that,
11 Your Honor, it should be without prejudice to that parent's
12 ability to recover consortium-like remedies through other
13 claims, and that's the point we made.

14 We put -- we put in an appendix in which we made clear
15 that consortium-type damages -- loss of companionship, support,
16 so forth -- is permissible in those states through other causes
17 of action. Just if you're going to dismiss the standalone
18 claim, just make it without prejudice to the ability for those
19 parents to recover similar remedies through other -- through
20 other claims.

21 **THE COURT:** If those states -- if you -- if plaintiffs
22 understand that those states do not allow a standalone claim,
23 why are they being brought in the first instance forcing a
24 motion on the point?

25 **MR. TELLIS:** Well, I don't think that -- it's like

1 putting the briefing before the complaint. I'm not sure --

2 **THE COURT:** No, it's not. You have a Rule 11
3 obligation to only bring claims upon which there is a possible
4 legal basis; and if a state says a parent cannot bring a
5 consortium claim for the injuries or death of a child, then I
6 don't understand the Rule 11 argument in the first instance for
7 bringing the claim.

8 **MR. TELLIS:** Well, I would say this: I don't think --
9 I'd have to go and look at the states you describe, but let's
10 just take a couple, for example, where there is no specific
11 case saying that a parent can do it but says, for example, a
12 child can bring a claim.

13 There is case law, for example, in Connecticut, where
14 there are extensions of that theory that say simply because
15 case law suggests that only a child can bring a claim when a
16 parent dies, doesn't mean that a parent can't bring one. And
17 so we've tried to argue in cases where there isn't a state
18 recognition of a filial claim, that there ought to be one.

19 Connecticut is a great example, Your Honor. There's
20 only -- there's no appellate decision that says a parent can
21 bring one. There are competing trial court decisions, and the
22 argument is: Well, the basis for why a child can bring one,
23 that is, that a parent provides support, doesn't exist when a
24 child passes away. Children don't typically provide support,
25 particularly if they're like mine, or services.

1 But those cases recognize that consortium is about more
2 than just services. It's about the sentimental, emotional
3 relationship, loss of companionship, loss of comfort, and that
4 emotional connection doesn't run one way from just a parent to
5 a child. It runs from a child to a parent as well. So there's
6 no good reason. There's no public policy reason why those
7 claims should be prohibited.

8 **THE COURT:** So in California, for instance, the four
9 elements of a cause of action for loss of consortium include a
10 valid and lawful marriage between a plaintiff and the person
11 injured. That's California law. Is there any California
12 plaintiff who is trying to assert this on behalf of a child
13 when the law says you can't meet the first element?

14 **MR. TELLIS:** Yeah, I don't know if there is a
15 California plaintiff who has filed a short-form complaint
16 alleging a loss of consortium. Certainly the master complaint
17 brings it on behalf of all plaintiffs, but --

18 **THE COURT:** That is my point --

19 **MR. TELLIS:** I understand.

20 **THE COURT:** -- that if I've got California law that
21 says, "Hey, the first element is you've got to have a
22 marriage," I don't understand why I have to be doing the work
23 to analyze California short-form complaints or what the Rule 11
24 basis would be for those plaintiffs to bring it in the first
25 instance.

1 Now, it could be that there are other states for whom this
2 is, you know, a much broader-based approach, and for those I
3 can look at that.

4 **MR. TELLIS:** But, Your Honor, we haven't asked you to
5 go -- we put in an appendix that says "These states don't
6 recognize a standalone claim." If Your Honor is going to
7 dismiss those, we don't take issue with it other than it should
8 be without prejudice.

9 We haven't tried to have Your Honor work through every
10 state where there's clearly a prohibition. We've put an
11 appendix that acknowledges those states in which a standalone
12 claim doesn't exist. We've only asked, though, that in those
13 states we've indicated examples where through an unlabeled
14 personal injury claim, it's not clear whether, for example, the
15 plaintiff was alleging a loss of consortium claim or something
16 else. Loss of consortium type damages were awarded, and so our
17 position was simply do it without prejudice.

18 **THE COURT:** Any response?

19 **MS. LANGNER:** Yes, Your Honor.

20 And to address your question, there is at least one
21 California plaintiff. My office looked into this last night,
22 and we did find one plaintiff.

23 My response to my colleague's other points, Your Honor,
24 we're not asking for -- the relief that he brings up is not
25 what we're asking for. These plaintiffs have brought

1 standalone loss of consortium claims, and we are asking that if
2 a state law prohibits loss of consortium claims by parents,
3 that those standalone claims be dismissed.

4 **THE COURT:** All right.

5 **MS. LANGNER:** And if I may, Your Honor, address the
6 decision that was referenced in Connecticut. That seems to be
7 one of the only states that the plaintiffs dispute.

8 The plaintiff cited to a case *Perez vs. Stanford*, which
9 was a 2021 Connecticut Superior Court opinion, for the
10 proposition that loss of filial consortium was permitted in a
11 case involving catastrophic injuries to a minor child.

12 We have two other cases that we've cited, Your Honor, more
13 recent decisions, where the courts came to the opposite
14 conclusion.

15 **THE COURT:** Well, are they equal -- are they all Court
16 of Appeal? Is one controlling and the other not?

17 **MS. LANGNER:** Your Honor, all three of them are trial
18 court -- Superior Court cases.

19 But what I was going to say is, the case that plaintiffs
20 cite to you, *Perez vs. Stanford*, in reaching its decision, the
21 *Perez* court relied on the *Campos vs. Coleman* decision, which is
22 a Connecticut Supreme Court case that recognized the reverse of
23 what we're talking about here, which is a cause of action by a
24 minor child for loss of parental consortium.

25 And that reasoning of the *Perez* case and the underlying

1 *Campos* case was rejected by the two cases that defendants cite,
2 *Stewart* and *Menefee*, and they -- both of those cases find --
3 found the reasoning and reliance on *Campos* flawed. And the
4 flaw in the reasoning is this, Your Honor: In *Campos* the case
5 that permitted the minor child to bring a parental loss of
6 consortium claim, the court expressly limited that right to
7 minor children due to the special obligations and legal duties
8 that flow from parents to their minor children.

9 The court acknowledged that love and affection continues
10 between parents and their adult children, but expressly
11 precluded adult children from bringing loss of consortium
12 claims.

13 The *Campos* court stated (as read):

14 "Adults do not have the same legal entitlements with
15 respect to their parents as minor children and are
16 presumptively autonomous and responsible for their own
17 well being."

18 The *Campos* court also limited the damages for minor
19 plaintiffs to the date of injury until the date that the minor
20 child reached the age of majority, again indicating that this
21 is -- this is just an issue for minor children.

22 And recognizing this flawed argument, the court in the
23 cases that defendants cite, *Stewart*, stated that it would be
24 incongruous to conclude that a presumptively autonomous adult
25 child may recover for loss of consortium based on injuries to

1 her child when a presumptively autonomous adult child cannot
2 recover for loss of consortium arising from injuries to the
3 parent.

4 The same legal obligations and entitlements identified in
5 *Campos*, the claim -- the case underlying the case cited by
6 plaintiffs to support a claim for loss of parental consortium
7 do not exist here.

8 One other thing, Your Honor. Connecticut courts have
9 found that permitting third-party liability is the exception
10 rather than the rule; and as such, absent clear appellate
11 authority permitting filial consortium claims, and there is
12 none in Connecticut, this Court should decline to extend loss
13 of consortium to Connecticut plaintiffs here.

14 One final note, Your Honor. There were statements that
15 are instructive on this point as well. Defendants cite to
16 Restatement Second of Torts, Section 693, which permit spousal
17 loss of consortium claims. There are a number of Connecticut
18 courts that follow and have relied on Restatement Second 693,
19 again, as it relates to spousal loss of consortium claims.

20 The corollary Restatement that relates to filial loss of
21 consortium claims, that's Section 703, there are no Connecticut
22 cases that defendants are aware of that cite to or rely on that
23 provision.

24 So, in short, Your Honor, there's no authority indicating
25 that a Connecticut court, Connecticut Appellate Court, would

1 permit a filial loss of consortium claim; and there is
2 authority to the contrary, the *Campos* decision, that suggests
3 that adults cannot recover loss of consortium type claims for
4 family relationships, again setting aside spouses.

5 **THE COURT:** Okay. Thank you.

6 **MR. TELLIS:** Your Honor, if you prefer -- I hesitate
7 to say it, but I will. If you'd like us to take a second look
8 and dismiss before you rule any short-form claims or claims by
9 plaintiffs in states that clearly don't recognize a standalone
10 claim for loss of consortium, we're happy to do that.

11 **THE COURT:** Less work is always good, Mr. Tellis, when
12 one's plate is overflowing.

13 **MR. TELLIS:** Understood.

14 **MS. LANGNER:** Your Honor, may I make one final point?

15 The plaintiffs concede in their brief that claims for
16 medical aid, medical treatment, and medications are not
17 recoverable and should be dismissed. The fact that they might
18 be able to recover these expenses under some other theory of
19 liability, like wrongful death, is not persuasive -- not a
20 reason why they should be permitted to seek those claims under
21 a loss of consortium claim; and we would, therefore, request
22 that the Court limit plaintiffs' claims accordingly.

23 **THE COURT:** So I'm not sure I understood that to be
24 plaintiffs' position.

25 **MR. TELLIS:** This is part and parcel of the same

1 argument, which is if we -- in the loss of consortium claim, if
2 we ask for medical costs as a recovery, it shouldn't be
3 permitted simply because it's put into the loss of consortium
4 claim. And, therefore, if there's no loss of consortium claim,
5 then everything that's pled in there should go, and our
6 position is you are entitled to recover it through other
7 claims. So if you're going to dismiss the loss of consortium
8 claim and has the medical costs in it, it shouldn't preclude a
9 plaintiff from recovering it elsewhere.

10 **THE COURT:** I think that that's pretty obvious. I'm
11 not looking at damages in every single claim that is brought.

12 **MR. TELLIS:** Understood.

13 **THE COURT:** So that's not in front of me. And to the
14 extent there is any misunderstanding about it, I'll just
15 footnote it.

16 Okay.

17 **MR. TELLIS:** Thank you, Your Honor.

18 **MS. LANGNER:** Thank you, Your Honor.

19 **THE COURT:** Anything else?

20 **MR. SCHMIDT:** Yes, Your Honor. Paul Schmidt again for
21 Meta.

22 May I make one factual point in response to a question
23 Your Honor asked?

24 **THE COURT:** Sure.

25 **MR. SCHMIDT:** On the question about short-form

1 complaints alleging CSAM in the bellwether pool, we have
2 checked. We saw one where the box was checked for CSAM but
3 where there were no allegations beyond the second amended
4 complaint.

5 **THE COURT:** Okay. I understand there have been a
6 couple of new defendants; is that right? Or complaints brought
7 against a couple of new defendants, Roblox and Discord. Where
8 are we on that? I don't think I have -- I take it there's
9 no -- yeah, where are we?

10 **MS. HAZAM:** Your Honor, Lexi Hazam for plaintiffs.

11 I do not have any statistics with regards to that, but I
12 believe that we have present today counsel who may have named
13 one or more of those defendants in complaints. If Mr. Bergman
14 could approach the podium to speak to that.

15 **THE COURT:** Just let me know. Have they been served?
16 Yes or no.

17 **MR. BERGMAN:** Yes, Your Honor.

18 **THE COURT:** And when is the response from them due, or
19 have you -- all right. Come on forward.

20 Do I have anybody in the audience from Roblox or Discord?
21 No? On the defense side?

22 (No response.)

23 **THE COURT:** Okay. Have you talked to counsel for
24 those defendants?

25 **MR. BERGMAN:** We have not as of yet, Your Honor.

1 **THE COURT:** All right. Well, make sure you talk to
2 them before the next CMC so we know how we're going to fold
3 them in, if at all.

4 **MR. BERGMAN:** Very good, Your Honor. We will. Thank
5 you.

6 **THE COURT:** All right. Anything else from the
7 plaintiffs?

8 **MS. HAZAM:** Nothing further, Your Honor.

9 **THE COURT:** Anything else from the defendants?

10 **MR. SCHMIDT:** Nothing further, Your Honor.

11 **THE COURT:** All right. Well, then, since I am not
12 going to see you until July 12th, I wish you-all a Happy Fourth
13 of July. I've spent a lot of time talking to a lot of
14 prospective jurors about Fourth of July and our Constitution
15 and the right to a trial by jury and how important it is that
16 they spend four months with me.

17 I'll say this: If your clients do not pay their employees
18 for jury service, they should, because I spend a lot of time on
19 your cases and many judges spend a lot of time on your cases
20 and once in a while -- and last time I did one of these was
21 2016, it doesn't happen all the time -- we have a hard time
22 finding jurors who aren't going to lose their home or, you
23 know, can't make ends meet if they serve. And there are a
24 number of corporate partners and institutions who do allow
25 their employees to serve in those long-cause actions, and we

1 appreciate it.

2 So I would just encourage you-all to think about that
3 because it really does matter for democracy and for right to a
4 trial by jury. Defendants, as I tell them, you know, I can't
5 just send them to prison. They have a right to have the
6 Government prove that they're guilty of what the Government
7 says they're guilty of, but I can't afford people those rights
8 without having jurors. So I thank the jurors and I note those
9 companies who are paying their employees to sit there and to do
10 their duty.

11 So, anyway, with that, Happy Fourth of July and we'll see
12 you in about a month.

13 **THE CLERK:** Court is adjourned.

14 (Proceedings adjourned at 11:23 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Monday, June 24, 2024

A handwritten signature in black ink, reading "Kelly Shainline", is written over a horizontal line.

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter